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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FABIENNE RIGAUD, et al., Plaintiffs and Appellants, v. BRUCE HARRISON, et al., Defendants and Respondents.	B170826 (Los Angeles County Super. Ct. No. BC286677)

APPEAL from a judgment of the Los Angeles County Superior Court. John P. Shook, Judge. Affirmed, modified and reversed in part, and remanded with directions.

Fabienne Rigaud and Brent D. Winter, in pro. per., for Plaintiffs and Appellants.

Wiezorek & Rice and William R. Moore for Defendants and Respondents Bruce Harrison, Gary R. Holme, Gary Cleff and the Beaumont Company.

Sabaitis O'Callaghan, Michael T. O'Callaghan and Omar J. Yassin for Defendants and Respondents Esther Eisenstein, individually and on behalf of the Esther Eisenstein Separate Property Trust.

SUMMARY

In an action by tenants against the owner and property manager of their apartment, the trial court sustained the defendants' demurrers to the tenants' second amended complaint without leave to amend, awarded attorney's fees and costs to the defendants, and dismissed the action. We affirm, modify and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and appellants Fabienne Rigaud and Brent Winter (appellants) are residential tenants in an apartment owned by defendants and respondents Esther Eisenstein, individually and on behalf of the Esther Eisenstein Separate Property Trust (Eisenstein), and managed on Eisenstein's behalf by defendants and respondents Bruce Harrison, Gary R. Holme, Gary Cleff and the Beaumont Company (Beaumont or, when mentioned in conjunction with Eisenstein, collectively, respondents).

In December 2002, appellants, who have represented themselves throughout this litigation, initiated an action against Eisenstein and Beaumont seeking, among other things, $100,000 in punitive damages for respondents' alleged violation of the Federal fair housing act and the California Fair Employment and Housing Act, Government Code section 12955 et seq. (FEHA). Appellants alleged they had been the subject of two frivolous unlawful detainer actions, had been given a new lease decreasing services they received under their old lease, and had been subjected to retaliation, harassment and malicious mischief on the part of Beaumont representatives who removed their names from their mailbox. Respondents filed unopposed demurrers, which were sustained with leave to amend.

Appellants filed a first amended complaint. In addition to repeating their earlier allegations, appellants claimed they had an oral agreement with the prior owner/manager of the property, who had permitted them to keep a piece of furniture outside their apartment for their cat, and verbally agreed on a particular parking arrangement. Appellants also alleged respondents had increased their rent, an increase which was apparently in accordance with the Rent Stabilization Ordinance of the Los Angeles

Housing Department, but which violated appellants' alleged oral agreement with the prior property owner. Respondents demurred again. Those demurrers, which appellants opposed, were sustained with leave to amend. In sustaining the demurrers, the trial court gave appellants detailed guidance regarding how to correct their pleading defects, and referred them to the rules of court and a legal treatise to help them rectify their mistakes.

The operative second amended complaint was filed in June 2003. It recounts in detail the allegations regarding the unlawful detainer actions, respondents' conduct with respect to removal of appellants' names from their mailbox, and attempts to plead three causes of action. The first claim, labeled "Discrimination," alleges that respondents' conduct was motivated by a desire "to remove the [appellants] from their residence and replace them with tenants who will pay a higher rental amount," in violation of FEHA and the Unruh Civil Rights Act (Civ. Code, § 51 et seq.). In the second cause of action for "Breach of Contract," appellants allege respondents committed criminal violations (vandalism in violation of Pen. Code, § 594), harassed them, and reduced their services, thereby breaching the covenant of quiet enjoyment implied in every rental agreement. In the third cause of action for "Intentional Infliction of Emotional Distress," appellants allege Beaumont's agent engaged in willful, retaliatory acts which caused Rigaud to suffer a nervous dermatological condition and caused both appellants mental and emotional distress and financial damage, for which appellants sought general and special damages of at least $200,000, plus punitive damages.

Beaumont demurred to the second amended complaint. Eisenstein moved for judgment on the pleadings, and joined Beaumont's demurrer. Appellants opposed both motions. On August 12, 2003, the trial court granted Eisenstein's motion without leave to amend. The court also sustained, without leave to amend, Beaumont's demurrer to the second amended complaint and entered judgment in respondents' favor.

Appellants filed a motion to reconsider the trial court's order sustaining the demurrer and granting the motion for judgment on the pleadings. The court granted that motion, but again sustained the demurrer without leave to amend.[1]

Subsequently, Eisenstein and Beaumont each filed a motion for attorney's fees and costs. The trial court granted both motions, and awarded the full amounts requested. Appellants were ordered to pay Eisenstein $16,749.93 in attorney's fees and litigation costs, and $16,323.48 in fees and costs to Beaumont. This appeal followed.

DISCUSSION

Appellants contend the trial court erred when it sustained, without leave to amend, respondents' demurrers to their second amended complaint, and erred again in awarding attorney's fees to respondents. The second assertion alone has merit.

1. The demurrers were properly sustained.

Appellants' arguments appear to claim the trial court erred in sustaining the demurrers because factual issues exist which should have saved their pleading or which could have saved it, had they been permitted to amend. We disagree.

As for the first cause of action, which is essentially one for "economic discrimination," appellants have not alleged or cited any authority which would bring them within any class protected from discrimination under FEHA or the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1161-1162 [holding, in an action against landlords requiring minimum tenant income levels, that Unruh Act

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[1] An order prepared by Eisenstein's attorney indicates that the motion for reconsideration was denied, and that the trial court reaffirmed its rulings on Eisenstein's demurrer and the motion for judgment on the pleadings. Although we do not have the benefit of a reporter's transcript to clarify the point, given the court's minute order, the attorney-prepared order appears to be mistaken. In any event, the discrepancy is immaterial. There is no dispute the trial court reaffirmed its ruling on the demurrer, and the standard of review for a ruling sustaining a demurrer without leave to amend is the same as an order granting a motion for judgment on the pleadings. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.)

does not protect against economic discrimination]; Gov. Code, § 12955, subd. (a) [Stating it is unlawful to commit housing discrimination only on the following protected classifications: "race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability"].) Appellants bear the burden of proving the trial court erred in sustaining the demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020). To carry that burden, appellants are required, at a minimum, to show the manner in which the complaint could be amended and how the amendment would change its legal effect, and to cite authority supporting their position. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388; cf. *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546). This showing may be made either in the trial court or on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.*, *supra*, 222 Cal.App.3d at p. 1386.) Reversible error is committed if the facts alleged or offered to be alleged show an entitlement to relief under any possible legal theory. (*Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1119-1120.) However, it is appellants' burden to show how the complaint might be amended to state a viable claim. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) Appellants have not sustained their burden with respect to the cause of action for discrimination.

Turning to the contract claim, appellants' brief focuses solely on their allegation that respondents' removal of their vehicle from a common area parking space violated an oral agreement between them and the prior property owner, and defied a local zoning ordinance. For purposes of the contract claim, the zoning ordinance on which appellants rely is irrelevant. The ordinance merely recites that the parking capacity of a given structure must relate to the number of units in the structure. (See Los Angeles Mun. Code, § 12.21.A.4.) Even if the allegation is true, as we must assume it is, the removal of appellants' car from the common area of the apartment complex in violation of an oral agreement with a prior owner bears no relation to respondents' alleged violation of a local zoning ordinance. Despite the length of the second amended complaint, and the fact

that appellants have now had five opportunities to amend their complaint, appellants have never stated the terms of the oral agreement respondents are alleged to have violated, nor have they alleged any reason why that oral agreement trumps their own written lease.

Appellants' third cause of action for intentional infliction of emotional distress has been waived. Appellants have presented no argument or authority on appeal regarding sustaining of the demurrer to that claim. Litigants are expected to present intelligent legal argument with citation of supporting authorities on each point of contention. This rule applies equally to litigants acting without counsel. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) If argument or authority is not provided on a particular point, this court may exercise its right to treat the point as waived. (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164.) We will give appellants' third claim for relief no further consideration. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)[2]

2. The attorney's fees award must be reversed.

After the action was dismissed, each respondent filed a motion seeking attorney's fees as a component of its litigation expenses. Eisenstein sought just over $16,750.00 in attorney's fees and costs, and Beaumont requested approximately $16,300.00. Without explanation, the trial court awarded each respondent the full amount of its request.

Without citation to any authority, appellants insist the attorney's fee awards should be reversed because "the American Rule is the correct and proper standard to apply" in this case. Ordinarily, a party's failure to make reasoned argument or cite pertinent authority constitutes a waiver of that claim on appeal. (*Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.) "[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary

[2] Appellants requested we take judicial notice of a disciplinary matter involving the trial court judge in this case in his capacity as a judge and a commercial landlord. The matter is irrelevant; the request is denied.

elements allows this court to treat appellant's [contentions] as waived." (*Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448, citation omitted.) These requirements apply equally to appellants acting without counsel. (*McComber v. Wells*, *supra*, 72 Cal.App.4th at pp. 522-523.) Appellants' assertion of an ultimate conclusion – that the fee awards were improper – is insufficient. Notwithstanding appellants' failure to present authority or reasoned argument, we must decide whether a fee award in excess of $30,000 against these pro per plaintiffs is proper.

An order denying or granting an attorney's fee award is reviewed for abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) But the "'determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.' [Citation.]" (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; see also *Whiteside v. Tenet Healthcare Corp.* (2002) 101 Cal.App.4th 693, 707 [legal basis for attorney's fee award is reviewed de novo].) Even on this sparse record, it is clear some of the requisite criteria are not satisfied. As for others, it is necessary to remand the matter to the trial court to conduct additional proceedings and make appropriate findings.

Eisenstein and Beaumont each sought attorney's fees based on Civil Code sections 1717 and 1942.5.[3] The record does not identify the specific bases for the trial court's grant of the fee awards, and does not contain a reporter's transcript or settled statement of the hearing on the motions. Our review is based entirely on a minute order granting Eisenstein's motion "as prayed," and another order granting Beaumont's motion without explanation.

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[3] Respondents' fee requests were also premised on Code of Civil Procedure section 1033.5. That statute does not provide an independent basis for the recovery of attorney's fees. It merely makes fees recoverable as a component of a prevailing party's costs under Code of Civil Procedure section 1032, when fees are authorized by contract or statute. (Code Civ. Proc., § 1033.5, subd. (a)(10).)

The trial court was within its authority to find Eisenstein a "prevailing party" and award it attorney's fees under Civil Code section 1717. Paragraph No. 21 of the lease agreement between appellant Rigaud and Eisenstein's predecessor provides for an award of attorney's fees to the prevailing party in any legal action related to the lease. Beaumont was not a signatory to the lease.[4] Ordinarily, attorney's fees authorized by contract may be awarded only in an action between signatories to a contract. (*Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 544-545; see Code Civ. Proc., § 1021.) However, the Supreme Court has held that Civil Code section 1717 must be interpreted to provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128-129; see also *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 149 [nonsignatory to contract, who is employed by signatory and sued for action taken in professional capacity, may recover attorney's fees].) This is such a case. Accordingly, Beaumont is also entitled to attorney's fees under Civil Code section 1717. However, in this case, any contractual attorney's fee award made under the terms of the lease is, by mutual agreement of the parties, capped at $500. In "any legal action or proceeding . . . related to this Agreement, the prevailing party shall be entitled to recover attorneys fees not to exceed $500.00." Thus, Eisenstein and Beaumont are entitled to, at most, $500 in contractual attorney's fees. Beyond that amount, however, the additional fee award cannot stand unless it finds independent support beyond the rental contract.

In addition to Civil Code section 1717, respondents sought and may be entitled to recover attorney's fees under Civil Code section 1942.5. That statute provides: "In any

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[4] Actually, based on the copy in the record, it appears that neither Eisenstein nor its predecessor owner was a signatory to the 1994 lease. Nonetheless, no party disputes the validity of that agreement.

action brought for damages for retaliatory eviction, the court shall award reasonable attorney's fees to the prevailing party if either party requests attorney's fees upon the initiation of the action."[5] (Civ. Code, § 1942.5, subd. (g).) The remedies provided by Civil Code section 1942.5 supplement, they do not supplant, other available remedies. (Civ. Code, § 1942.5, subd. (h).)

But we face a significant problem. The record contains no oral or written findings apportioning the attorney's fees awarded among any of the claims at issue, including Civil Code section 1942.5. Because both contract and unrelated statutory and tort claims were at issue, the trial court was required to apportion the award between the unrelated claims. (*Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d at p. 129.) The only instance in which apportionment is not required is when the trial court concludes the contract and noncontract claims are inextricably intertwined. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111; see also *Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d at pp. 129-130 ["Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed"].) In this case, it cannot reasonably be said that appellants' contract claim is inextricably intertwined, or even overlaps, their harassment and other noncontract claims. Accordingly, apportionment of the fee award was required. Remand is necessary to enable the trial court to determine whether respondents are entitled to attorney's fees under Civil Code section 1942.5 and, if so, to apportion that award.

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[5] Neither appellants nor Eisenstein requested attorney's fees "upon the initiation of the action." However, Beaumont satisfied this element of the statute on behalf of all parties by requesting attorney's fees in its answer to the complaint.

In addition to its request for attorney's fees under the contract and Civil Code section 1942.5, Beaumont also sought to recover fees under the Unruh Act and FEHA.[6] Beaumont may not recover attorney's fees under the Unruh Act. In general terms, the Unruh Act protects civil rights by exacting civil penalties from those who intentionally discriminate against a member of a protected class in all areas of public accommodation and business establishments. Toward that end, Civil Code section 52 provides that a person who violates the Unruh Act is, among other things, "liable for . . . any attorney's fees . . . suffered by any person denied the rights" protected by the Unruh Act. (Civ. Code, § 52, subds. (a) & (b)(3).) In contrast to the retaliatory eviction statute discussed above (Civ. Code, § 1942.5), the attorney's fee provisions in the Unruh Act are not reciprocal. Only those who are found to have been discriminated against, and "denied the rights" protected by the Unruh Act may recover attorney's fees. The Unruh Act does not provide a legitimate basis for Beaumont's fee award.

Beaumont's claim to attorney's fees under FEHA also faces a roadblock on this sparse record. Plaintiffs who prevail in FEHA actions are typically awarded attorney's fees as a matter of course. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387 (*Cummings*); *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 865 (*Rosenman*).) However, no similar standard applies to prevailing defendants. It is not sufficient that an action is poorly pled or lacks merit. Rather, a trial court may award a FEHA defendant attorney's fees "'only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.' [Citation.]" (*Id*. at p. 866.) Such a finding is necessary when a court awards attorney's fees to a successful defendant. Moreover, there is "a nonwaivable requirement" that the trial court's findings be made in writing in every FEHA case in which a defendant is

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[6] Eisenstein did not request attorney's fees based on the Unruh Act or FEHA. Thus, Eisenstein is entitled to an award of contractual attorney's fees of, at most, $500 (assuming none of that sum should go to Beaumont).

awarded fees. (*Id.* at p. 868.) The requirement of written findings goes "a long way towards limiting defendants' receipt of attorney fees awards to the extreme cases envisioned by *Cummings* . . . ." (*Ibid.*) In this case, the trial court failed to make written findings of the extreme conduct necessary to support a fee award. On this basis alone, the order awarding Beaumont attorney's fees under FEHA requires reversal. Remand is necessary to permit the trial court to make written findings and, in the event it deems an award appropriate, an apportionment.

Finally, there is the question of the substantial size of the attorney's fee awards. Again, we lack the benefit of an explanation of the trial court's bases for determining that the amount of fees was appropriate, an issue we review for abuse of discretion. A trial court makes its own determination of the value of the legal services rendered. The decision is not made in a vacuum. Rather, the determination is made "'after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) A trial court is also well-advised to make findings regarding a plaintiff's ability to pay attorney's fees, and the size of a fee award that is appropriate in light of the plaintiff's financial situation. An award of attorney's fees """should not subject the plaintiff to financial ruin.'" [Citation.]" (*Rosenman*, *supra*, 91 Cal.App.4th at pp. 868-869, fn. 42.) Appellants, who were pro per throughout this litigation, raised the issue of their inability to satisfy a large award in opposition to respondents' motions below. The trial court does not appear to have taken that factor into consideration.

The trial court also does not appear to have relied on other pertinent factors in determining the amount of its awards. For example, the substantial fee awards do not appear commensurate with the relative simplicity of this litigation, or the lack of special expertise required or applied by respondents' counsel in their handling of straightforward motions. In addition, respondents' counsel made no effort to segregate the amount of

their fee requests as between time spent on the contract versus tort and other claims. Moreover, although respondents' attorneys profess to have devoted a significant amount of time and effort to the case, numerous motions and documents in the record largely (in some cases, almost exactly) replicate others filed by the party itself or a codefendant, while others are no more than one-page joinders in another party's motion. Given that redundancy, notwithstanding their ultimate success, it appears respondents have received duplicative and undeservedly large fee awards. It is true the trial court is the best judge of the value of the professional services rendered in its court, and we will not disturb that determination unless we are convinced it is clearly wrong. (See *PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095 [Attorney's fee award should be upheld unless reviewing court is "convinced" award is "clearly wrong"].) We are convinced the trial court was incorrect and failed to exercise its considerable discretion. Under these circumstances, coupled with those discussed above, the matter must, in part, be remanded to the trial court to conduct further proceedings and take appropriate action consistent with the views expressed in this opinion.

DISPOSITION

The judgment is affirmed in part and reversed in part. The order sustaining respondents' demurrers to the second amended complaint is affirmed. The postjudgment orders awarding contractual attorney's fees under Civil Code section 1717 and Code of Civil Procedure section 1033.5, subdivision (a)(10) are modified to reduce the total award of contractual attorney's fees to $500, and, as modified, remanded for the trial court to apportion the award, as appropriate, between the Eisenstein and Beaumont respondents. The remainder of the postjudgment orders are reversed and remanded with directions to the trial court to (1) enter a new and different postjudgment order reflecting that Beaumont is not entitled to attorney's fees under Civil Code section 52; and (2) conduct further proceedings and make findings to determine whether either respondent is entitled to attorney's fees under Civil Code section 1942.5 and, if so, in what amount; and (3) conduct further proceedings and make written findings to determine whether

Beaumont is entitled to attorney's fees under Government Code section 12965 and, if so, in what amount. Each party is to bear its or their own costs of appeal.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.